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No. 683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

E. COCKRELL, JR.,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 14, 1970

FIDELITY PRINTING COMPANY, INC., HOUSTON

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E. Cockrell, Jr.,

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Federal Power Commission,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

E. Cockrell, Jr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 19, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, pp. 1-70) and its opinion on petitions for rehearing (Appendix B, pp. 1-3) are not yet reported. The opinions and orders of the Federal Power Commission (Appendix D, pp. 1-256,

and Appendix E, pp. 1-112) are reported at 40 FPC 530 and 41 FPC 301. The opinion of the Hearing Examiner (III J. A. (I) 62d-447d) is reported at 40 FPC 703.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1970 (Appendix C, p. 1) and was clarified by an opinion and order denying petitions for rehearing entered on June 16, 1970 (Appendix B, pp. 1-3). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in refusing to enter an order reversing and remanding the case to the Federal Power Commission (Commission), after: (a) the Commission, in response to inquiry from the Court of Appeals, formally requested a remand; (b) the Court of Appeals expressed its view that the opinions and orders on review were deficient and Commission reconsideration was warranted; (c) the Court of Appeals had found the Commission's opinions and orders inadequate and incomplete, particularly as to findings on critical issues of a national and area natural gas supply deficiency and of industry capital requirements for exploration and development; and (d) the record showed, and the Court of Appeals recognized, that

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[1] Separate printed appendices filed by petitioners Continental Oil Company, et al., contain the opinions of the Court below and of the Federal Power Commission. The Joint Appendix in the Court of Appeals consisted of four volumes designated as Part I and two volumes designated as Part II. The citation III J. A. (I) 62d therefore refers to Volume III of Part I, page 62d. Such page designations appear at the bottom of each page, and pages included in each of the volumes are shown in parentheses at bottom of the cover.

the Commission had misinterpreted and failed to apply this Court's decision in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

2. Whether the Commission unlawfully ordered rate reductions and refunds by failing to follow *Permian* and failing to make required findings upon: (a) demand for natural gas and the supply needed to meet that demand; (b) incentives necessary for the required exploratory effort; (c) adverse consequences of a rollback of rates to levels of the 1950's; and (d) effect of area rates allowed upon capital requirements and the exploratory effort needed to assure adequate supplies.

3. Whether the Commission erred in refusing to consider current evidence as to the decline in exploration and inadequacy of gas supply to meet foreseeable demand, and whether the Court of Appeals erred in affirming such refusal and denying a motion for leave to adduce such evidence before the Commission under Section 19(b) of the Natural Gas Act.

4. Whether in determining revenue requirements, the Commission erred in relying principally upon (a) "unit costs" based upon imprecise, unsupported and erroneous allocation methods; and (b) stale, atypical, and unrepresentative data to determine revenue requirements, conflicting with principles stated in *Baltimore and Ohio R.R. Co.* v. *Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968).

5. Whether the Commission erred in failing to adopt a regulatory standard compatible with and appropriate for the characteristics of the gas producing industry in that the Commission in effect utilized narrow, irrational and improper utility rate base cost of service methods and failed to employ regulatory methods and criteria suitable for the industry to be regulated and which would fulfill the

Commission's function of assuring adequate gas supplies at just and reasonable prices.

STATUTES INVOLVED

Sections 4(a), 4(e), 5(a), 16 and 19(b) of the Natural Gas Act, 52 Stat. 821; as amended, 15 U.S.C. 717-717w, are involved and are reproduced at Appendix F, pp. 1-8.

STATEMENT

This is an area rate case under Sections 4 and 5 of the Natural Gas Act (Act). After hearings and by decision issued September 25, 1968, but based primarily upon 1960 data, the Commission prescribed rates for sales of natural gas produced in onshore and offshore Southern Louisiana to be effective October 1, 1968, and also provided for the ordering of refunds. The Southern Louisiana area of approximately 54,000 square miles is the source of approximately one-third of the nation's interstate natural gas supply and serves the District of Columbia and 28 states in the eastern and central United States, in which approximately 70% of the nation's population resides. The effect of the Commission's decision was a rollback to prices considered "in line" as of 1956, and a reduction of area producers' revenues by more than $70 million per year (IV J. A. (I) 670d-671d, 683d).

However, by the time of issuance of all opinions below, there was increasing evidence of a national shortage of natural gas. The impact of that shortage began for many interstate pipelines in late 1969 and early 1970, and today is a recognized reality among all segments of the natural gas industry. The Court of Appeals concluded that the imminence of this shortage and the related effect of the Commission-prescribed rates upon required exploratory

effort and the industry's capital requirements in 1969, 1970, and the future, had not been properly considered by the Commission, particularly in light of new supply studies released by the Commission's Staff in late 1969 and other data that became available after the record closed in 1965 and after the issuance of the Commission's opinion on September 25, 1968. The Court of Appeals also found the Commission remiss in not following the opinion rendered by this Court in *Permian* on May 1, 1968, particularly so in failing to give heed to this Court's numerous warnings that the Commission must consider the effects of prescribed area rates upon supply requirements, and admonitions that the Commission must improve its area-rate methodology, fact-finding, and decisional processes. With express "misgivings," the Court of Appeals affirmed the Commission, but on the assumption the Commission would reconsider its opinions and orders in the light of deficiencies enumerated by the court and of Commission expressions of concern over supply. The court thus indicated that if current data warranted, the Commission was free to stay, rescind, and set aside any parts of its opinions and orders. Petitions for rehearing were filed by parties raising questions as to Commission powers in light of "affirmance," and, in response to inquiry from the court, the Commission filed a formal request for remand. Thereafter, however, the Court of Appeals did not change its "affirmance," but clarified and restated its intent that the Commission could and should reassess its opinions and orders; the Commission then entered an order further staying its orders, and today has before it a motion seeking reopening, rescission, and modification of its opinions.

Procedural History. The case was instituted by the Commission on May 10, 1961, to fix rates for all jurisdictional sales of natural gas by producers in the Southern Lou-

isiana area (III J.A. (I) 1d
was a respondent before the
of parties included other
and state commissions. Hearings
10, 1963, and concluded
sion's opinion and implementing
were issued September 25, 1964
rehearing and motions for stay
19(a) of the Natural Gas Act
these applications and in modified
the record, producers sought
rent evidence reflecting
mian decision, the deterioration
tion, rising costs, and other
On October 23, 1968, the Commission
consider all applications together
on March 20, 1969, issued its
The applications, motions for stay, and
reopening; and modifying its
(IV J. A. (I) 892d). Simultaneously,
tuted a new proceeding at Docket No.
new area rates, but only for gas
tracts dated on or subsequent to October 1,
Offshore Federal Domain only.

Timely petitions for review were
tion 19(b) of the Act. The first such petition was filed in
the Court of Appeals for the Fifth Circuit on
mission certified the record to
1969. Motions for partial stay and

[2] This order defined the area as the
isiana lying south of the
both state and federal, in the
Louisiana.

adduce additional evidence, particularly as to the supply situation, also were filed by producer petitioners. After a conference before the court, the Commission issued an order staying until October 13, 1969, the provisions of its orders requiring rate reductions; and this stay subsequently was continued by the court after argument on December 17, 1969.

The court's opinion was issued March 19, 1970; timely petitions for rehearing followed, raising, *inter alia*, questions as to relationship between "affirmance" and Commission powers to reconsider and rescind its orders; the court thereupon requested Commission views, and, in response, the Commission requested remand;[3] however, on June 16, 1970, the court denied the petitions for rehearing, but reiterated that its "affirmance" was not intended to bar Commission reopening of any part of its orders and retrospective as well as prospective changes of the orders by the Commission. The Commission entered its order continuing the stay as to rate reductions and refunds on July 2, 1970, effective upon dissolution of the court's stay; and on July 14, 1970, the court issued its judgment.

The Commission Opinions. Without significant change of methods criticized in *Permian*, the Commission prescribed area rates, but added a novel indefinite moratorium and method for future regulation. As noted, the end result is a rollback to price levels of the 1950's and insufficient revenues for current required exploration and development.

On the major issue of adequacy of supply, the Commission recognized a correlation between supply and price and responsiveness of needed exploration to price (Appendix D, pp. 67, 154-159). However, the Commission made no findings as to future demand or future gas supplies re-

[3] Chairman Nassikas and Commissioner O'Connor did not join in the request for remand.

quired to meet demand, particularly supply requirements from Southern Louisiana. Producers asserted these omissions as errors and cited mounting evidence of an impending gas shortage in seeking rehearing and limited reopening, urging the Commission to consider current data on supply, demand and resultant capital requirements, and to make necessary findings (Appendix E, pp. 3-5). However, reopening was denied, leaving in effect the rates prescribed primarily on the basis of 1960 cost data and without consideration of current data on supply.

In prescribing such rates, the Commission used costing methods requiring compositing of purported costs and expenses, determining an investment rate base, applying a rate of return to that base to arrive at the return allowance, adding these amounts, and ultimately dividing by volumes to arrive at average "unit costs." Using composited cost data, the Commission purported to separately determine the cost per Mcf of "flowing gas" (Appendix D, pp. 83-107) and of "new gas-well gas" (Appendix D, pp. 29-84). The "flowing gas" cost was determined on the basis of purported composite historical averages for the 1960 test year, with some data on a national basis and some data on an area basis. The "new gas-well gas" cost was purportedly derived from data from numerous publications and questionnaires reflecting primarily 1960 data. With these data, the Commission (1) constructed a rate base for capitalized investment, applied to this base a 12% rate of return, added certain expense items, and derived a "unit cost" of 18.36¢ per Mcf for flowing or "first vintage" gas (Appendix D, p. 107); and (2) constructed a "current cost" model and derived a "unit cost" of 18.80¢ per Mcf for "second" and "third vintage" gas (Appendix D, p. 84). These two purported cost determinations then were used as the basis for prescribing the following maximum rates

for different "vintages" of gas produced in onshore Southern Louisiana (Appendix D, p. 179):

a. *First Vintage* (Contracts dated prior to January 1, 1961) — 18.5¢ per Mcf for all casinghead gas and gas-well gas and residue gas derived therefrom;[4]

b. *Second Vintage* (Contracts dated between January 1, 1961, through September 30, 1968) — 19.5¢ per Mcf for gas-well gas and residue gas derived therefrom, and 18.5¢ per Mcf for all other types of gas;

c. *Third Vintage* (Contracts dated on or after October 1, 1968) — 20¢ per Mcf for gas-well gas and residue gas derived therefrom, and 18.5¢ per Mcf for all other types of gas.

For gas produced offshore Southern Louisiana, not subject to State taxes, area rates were fixed at 1.5¢ per Mcf lower for each vintage and type of gas.

All rates are subject to adjustment downward if Btu content of gas is less than 1,000 per cubic foot, or upward if Btu content exceeds 1,050 (Appendix D, pp. 180-181). Third vintage rates are also subject to downward adjustments for deviations from "pipeline quality" standards (Appendix D, pp. 179-180).

The Commission also issued a new regulation providing that area rates continue in effect until changed by Commission action, thus imposing an indefinite moratorium on rate increases for first and second vintage sales; a fixed moratorium on third vintage onshore sales until January 1, 1974; and an indefinite moratorium on offshore third vintage sales except for increases of 1.5¢ per Mcf collectable subject to refund only. The Commission also provided that producers could seek relief by filing petitions "to

[4] All rates are stated per Mcf at 15.025 psia unless otherwise indicated.

waive or lift the limitation on rate change filings" (Appendix D, p. 169), or by petitioning for rulemaking to amend the rates on an area basis (Appendix D, pp. 171-174). The orders accompanying the opinions also imposed requirements for filing rate schedule supplements reflecting rates prescribed, statements as to quality adjustments and resulting area rates, and reports of amounts subject to refund under Section 4(e) of the Act after application of the prescribed rates in consolidated rate suspension dockets. Actual payment of refunds of past collections remained subject to further order of the Commission, but in absence of stays, rate reductions would have been effective prospectively from October 1, 1968.

In a separate opinion on rehearing, Commissioner John A. Carver, Jr. dissented (Appendix E, pp. 72-112), emphasizing the central issue is whether prices fixed are sufficient to elicit adequate gas supplies, and that ". . . a serious problem of gas supply has been identified, requiring action *in this case*" (Appendix E, p. 74). He noted that trends reflecting increasing demands and inadequate additions to reserves foretell deliverability problems which could lead to higher consumer costs; viewed "incentive" as negated by the rollback in rates, particularly because revenues from first and second vintage gas are the major source of capital funds for new investment; stated that substantial refunds and rate reductions amounted to retroactive expropriation of the "incentive" which had induced the initial commitment to interstate commerce; and concluded that the record supported fixing area rates at higher levels (Appendix E, pp. 110-112).

The Court of Appeals' Opinions. The same central issue was recognized by the Court of Appeals, and the major theme of its opinions is that on the supply problem and related issues, the Commission failed to follow this Court's

admonitions in *Permian*. The court thus began with the statement that its "affirmance does not reflect full satisfaction with the performance that the Commission turned in . . ." (Appendix A, pp. 2-3), and ultimately concluded that in light of "new evidence of a possible impending gas supply shortage" (Appendix B, p. 1), the court intended to permit the Commission "to stay, modify or rescind any part of its order, notwithstanding our affirmance, if circumstances appearing since the issuance of the orders make a change advisable" (Appendix B, p. 2). Between these statements, the court found more than ample grounds to reverse the Commission on questions here presented and to fashion a remand for corrective action by the Commission in accordance with such an opinion.

The court first traced evolution of producer rate regulation culminating in the *Permian* decision, which was issued more than four months prior to the Commission's Opinion No. 546 in the instant case. The court then summarized Opinion No. 546, but noted that two days prior to oral argument before the court, the Commission issued an order enlarging the scope of the new Docket No. AR69-1 proceeding to include the question of *prospective* adjustment of onshore and offshore Southern Louisiana area rates of all vintages (Appendix A, pp. 16-17). These and other indicia were taken to mean "that the Commission now recognizes the possibility of a serious supply deficiency and that it did not recognize this possibility in the decision we are reviewing" (Appendix A, p. 17, footnote omitted). In the court's view, however, this militated in favor of "affirmance rather than reversal," but subject to the court's expressions as to Commission powers and functions to modify its orders, discussed *infra*.

The court next considered certain substantive issues. It first rejected arguments that the cost determinations, rate

of return allowance, and "noncost elements" were unsupported or "overly generous to producers" (Appendix A, pp. 18-30), and then turned to issues raised by producer petitioners. On issues raised by the indefinite moratorium, the court found *Permian* not dispositive (Appendix A, pp. 31-32), but also found that the new regulation and an indefinite moratorium did not violate Constitutional requirements or the Administrative Procedure Act, 5 U.S.C. 550, and that Section 4 of the Natural Gas Act did not preclude an indefinite moratorium (Appendix A, pp. 32-36). On questions involving the Commission's rate of return, cost, and rate design determinations, the Court of Appeals was similarly "troubled" and critical. Thus, on the question of improper application of the "comparable earnings test" to determine rate of return, the court concluded producers "present persuasive evidence" that the test period used by the Commission was "unrepresentative" (Appendix A, pp. 39-40). On other questions as to costs used, the court found *Permian* controlling and that Commission conclusions on issues as to use of stale, unrepresentative data were supported by statements "that costs as a whole" had been "remarkably steady (or were even declining slightly)" during the decade between 1960 and 1970; but, at the same time, the court stated its agreement with Commissioner Carver's dissenting view "that the Commission should not have relied upon cost calculations floating in a vacuum but should have reviewed its computations in light of supply, demand, and other market forces . . ." (Appendix A, pp. 45-46).

The "most serious issue" involving Commission findings and legal standards — termed "the supply problem" by the court — similarly gave rise to extensive, telling revelation of error (Appendix A, pp. 46-56). The Court of Appeals recognized that this Court held in *Permian* that "adequate findings" would be required in the future, but noted that

the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. Thus, the Court of Appeals found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Appendix A, pp. 49-50), and listed defect after defect in "findings" on related questions of supply, demand, and actual availability of capital to the industry at rates prescribed (Appendix A, pp. 52-69). The court also noted existence of more current data available to the Commission, including the study by the Commission's Staff released in October, 1969, which shows "perhaps a certainty, that the supply of gas is dangerously low" and "a serious shortage, in fact, may already be unavoidable" (Appendix A, p. 52). In summary, the court found that the assessment of the crucial facts as to supply, demand, and impact of prescribed rates called for by this Court in *Permian* had not been made by the Commission in this case.

Nevertheless, the court did not grant motions before it for leave to adduce current evidence before the Commission in accordance with procedures of Section 19(b) of the Act, and did not reverse and remand the case to the Commission. Instead, it expressed "serious misgivings about affirming the Commission" and did so only with affirmative statements that the Commission still may "set aside the present order pending further determination" (Appendix A, pp. 56-57); that "affirmance" is not "a judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Appendix A, p. 59); that on "the crucial issue of sources for adequate financing, the Commission's findings, and for that matter the evidence, are almost nonexistent" (Appendix A, p. 63); that from the Commission's findings it is impossible to know current and future demand for Southern Louisiana gas, and supply must be considered in light of demand (Ap-

pendix A, pp. 65-68); that "the Commission must explain the relationship between the level of service, the demand for service, and the price it sets" (Appendix A, p. 68); that the "mandate" of the court should not "be interpreted to interfere with Commission action that would change the rates" (Appendix A, p. 69); that, citing Section 16 of the Act and with emphasis supplied, the Commission had power to "rescind" its orders; and that dissolution of the court's stay would be without prejudice to Commission power "to stay its own order or to take any other appropriate action affecting this case" (Appendix A, p. 70).

Petitions for rehearing urged, *inter alia*, that express reversal and remand were required in light of the deficiencies in the Commission orders so found by the court, and also raised the question of whether an "affirmance" could leave the Commission with powers to stay, vacate, modify, or rescind its orders, as contemplated by the court. The court thereupon directed the Commission to respond to the petitions and to two specific questions concerning (1) Commission authority to stay, modify or rescind an order that has been "affirmed"; and (2) equitable powers of the court to "affirm" while preserving Commission powers "to stay, modify, or rescind" an order.[5] In response, the Commission

[5] The full text of the questions posed by the Court of Appeals to the Commission is:

> "(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.
>
> "(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

(1) took the position that it would not "have authority to permit any *retroactive* increases or decreases in a rate order, unless authorized to do so by a court"; (2) stated that extent of the court's "equitable powers" had not been decided, and the court had "full statutory power to authorize or instruct the Commission" to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing"; (3) noted the need for clarification of the court's intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full'"; and (4) requested a "remand" so "that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion."[6]

However, on June 16, 1970, the court entered an order denying the petitions for rehearing and an opinion stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Appendix B, p. 1). The court stated that under Section 19(b) of the Act, the court had "broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so" (Appendix B, p. 2). The court, nevertheless, emphasized that its "judgment is affirmance and not a remand," and that all issues as to reopening,

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[6] "Response of Federal Power Commission to Petitions for Rehearing and Request for Remand," pp. 2-5 (Chairman Nassikas and Commissioner O'Connor did not concur in the request for remand).

modification of rates, and disposition of refunds were to be considered by the Commission (Appendix B, pp. 2-3).

REASONS FOR GRANTING THE WRIT

1. Importance of this case to all segments of the natural gas industry and all classes of consumers cannot be overstated. A shortage of natural gas already exists, as now recognized by the Commission and as feared by the Court of Appeals. That shortage is directly involved in this case because rates prescribed apply to an area that now provides up to one-third of the total national supply and serves more than one-half the consuming population of the United States. These rates were fixed primarily on the basis of purported 1960 cost data, without regard for the impending supply shortage, a decade of rising costs, erosive effects of inflation in the late 1960's, and compelling urgency for an increased national and area exploratory effort to attempt to find supply to meet increasing demand. As an immediate result, under the rates so fixed, amounts now exceeding $375 million, including interest, would be "refunded" to pipeline companies, and producers' rates and revenues would be rolled back to levels of the 1950's. The ultimate result would be an immediate, further decrease of capital available for needed exploration and a crippling blow to any effective industry effort, at present and for the foreseeable future, to avoid a serious national natural gas supply deficiency.

This result is not endorsed by the Court of Appeals, is not sought by the Commission in light of facts now available to it, and is not now urged by most who were parties before the Commission and the Court of Appeals. The only valid question remaining is, in essence, how to remedy the situation so recognized by the court, Commission, and most of the parties, as promptly and as equitably as possible. To

that end, the Court of Appeals attempted to fashion a remedy leaving the Commission free to take corrective steps present circumstances and known facts dictate, including recission of the deficient orders reviewed below. However, the court erred in failing to reverse and remand the case to the Commission. Several parties thus now question the validity of any corrective steps by the Commission responsive to the Court of Appeals' opinions. Moreover, if the "remedy" assumed by the court below is *not* available as a matter of law, then the "affirmance" below rests upon serious misinterpretation of the Act as to Commission powers to act despite the affirmance. The corrective measures contemplated by the court thus can be foreclosed solely because of such misinterpretation and contrary to that court's intent; and the court erred in not entering a judgment of reversal and remand on the basis of its own opinions, of the request by the Commission for a remand, and of the objectives of corrective action stated by the agency and the court itself. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U.S. 944 (1957).

If the court below so erred in its holdings as to Commission powers to take corrective action and to rescind its orders in light of the court's opinions despite the "affirmance," then that court erred in entering and permitting conclusive finality for opinions and a judgment (1) conflicting with decisions of this Court as to required remand of cases under Section 19(b) once Commission error is apparent and corrective action is required; (2) conflicting with this Court's *Permian* opinion, particularly as to Commission responsibility for adequate supplies in applying the area rate method; (3) conflicting with *Permian* and other constructions of the Act on major questions of cost determinations, rate design, and impact of area rate orders;

and (4) incorrectly deciding issues as to relationships between administrative agencies and reviewing courts of major importance under the Act and of general significance and applicability in administrative law and under other federal statutes having review provisions similar to Section 10(e) of the Act.

2. Reversal and remand by the Court of Appeals was fully warranted and proper [illegible] constructions of Section 10(e) [illegible] in *Federal Power Commission* [illegible] 393 U.S. 71 (1968), the Court of Appeals remanded cases by remand to the Commission for further proceedings" when it concludes the agency has made a decision or omission that [illegible] appropriate, and that corrective action should be required.

Such established rules of [illegible] fully applicable under the Act. [illegible] *Co.* v. *Federal Power Commission* [illegible] therefore, was the logical, lawful and required [illegible] to the court's enumeration of [illegible] adequacies, gaps, and misinterpretations [illegible] court thus stated what, heretofore, has been [illegible] predicates for judicial reversal, and indeed a [illegible] for remand of an agency order:

> ". . . A reviewing court cannot perform [illegible] test cannot in good conscience [illegible] unless it knows what the Commission [illegible] (Appendix A, p. 68).

This statement alone compelled remand, particularly in light of the court's conclusions that from the [illegible]

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[8] See *Securities and Exchange Commission* [illegible] U.S. 80 (1943); 332 U.S. 194 (1947); *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952).

findings we cannot know" the future demand for Southern Louisiana gas, and without such findings the required levels of supply, of exploratory effort, and even of area rates cannot be known (Appendix A, pp. 66-67). The court also had found Commission findings "almost non-existent" on the "crucial issue of sources for adequate financing" (Appendix A, pp. 63-64), and these gaps alone should have precluded an "affirmance" that could, in any way, bar Commission correction of such errors.

Beyond this, the formal request for remand by the respondent agency clearly should have been honored if this Court's prior constructions of Section 19(b), rather than an "experiment doctrine," remain controlling. See *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, *supra*. The Court of Appeals stated, quite plainly, its own disapproval of the Commission's "performance," and that the court had "little inclination to join the Commission" in presiding over the possible result of a predicted "severe gas shortage" (Appendix A, p. 47, fn. 87). Responsive to this criticism, the Commission requested remand and obviously desired fully to exercise its corrective powers in light of facts now available, and without questions as to legality of its corrective action. The court nevertheless adhered to the remedy it had fashioned, which, in its first opinion, the court considered required by what it termed "the 'experiment' doctrine of *Permian*" (Appendix A, pp. 10, 60). Yet, Section 19(b) of the Act should not permit such a condemnation of the Commission to be coupled with denial of the agency's request for unquestioned power to correct the very errors on which the condemnation rests.

This case thus presents the question of whether *Permian*, or any other opinion of this Court, modified the relationship between administrative agencies and reviewing courts

by creation of an "experiment doctrine" rendering reversal and remand inappropriate where the agency opinion is defective. Where error exists and corrective action is required, the settled principles heretofore controlling would dictate reversal and remand for further proceedings consistent with the reviewing court's opinion. Therefore, the court may have erroneously rendered itself and the agency powerless to correct plain, recognized errors in this case. Under those circumstances, departure from settled principles and misinterpretation of *Permian* will have created such a result. All those adversely affected by the substantive errors revealed below — including the consuming public — can be left entrapped by provisions of orders the court should not have approved, and which the agency expressly desired remanded to it.

If the remedy fashioned below is not lawful, then the Court of Appeals' departure from this Court's earlier constructions of the review provisions of the Act should not be allowed to stand. If the nature of the court's judgment can preclude such corrective Commission action as rescission or retrospective modification of its orders, this Court's review is essential to remove all doubts by reversal and remand as called for by the agency, by the Court of Appeals' own preliminary conclusions, and by prior constructions of Section 19(b) of the Act by this Court. Such orders of this Court also would provide the agency the latitude it sought by requesting remand, and would clarify the scope of statutory and equitable powers of a reviewing court under Section 19(b) of the Act and other statutes having the same or similar provisions for judicial review of agency

orders,[9] *particularly when, as here, a regulatory agency requests remand of its own opinions and orders.*

3. Related to the question of required remand are questions raised by the Commission's failure to follow the warnings of this Court in *Permian*, by Commission misinterpretation of *Permian*, and by any perpetuation of misreadings of *Permian* in future administration of the area rate method.

This Court thus called for responsible consideration of the interrelation of rates, capital, supply and demand as affirmative, express parts of the Commission's fact-finding and decisional processes. Gaps as to these most vital facts affecting interests of consumers on the one hand, and of investing producers on the other, were not contemplated by this Court. The Commission had more than four months to review this Court's *Permian* opinion before it entered its first opinion in this case, and more than ten months before it denied rehearing and motions to reopen. Yet, as found below, the Commission followed form without regard to substance. The Court of Appeals thus correctly was "disturbed" by the Commission's "excessive reliance" upon the mere "result" of *Permian* and correctly concluded that the Commission had not "read *Permian* carefully enough" (Appendix A, p. 60). However, the court's reluctance to label the Commission's errors as clearly reversible rested on that court's error in assuming that an "experiment doctrine" was intended to immunize decisions in subsequent area cases of such national importance as this case, even in the face of a critical supply situation, patent disregard of

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[9] See, *e.g.*, *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *International Union* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335 (1945); *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947); *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316 (1961).

Permian by the Commission, and failure to make the most basic findings required in an area rate case.

On the "most serious" issue of supply, this Court's mandate to the Commission in *Permian* also was plain, requiring Commission "assessment of the consequences of its orders for the character and future development of the industry."[10] In our view, this Court did not authorize an "experiment" in a second major case where the adverse consequences are so apparent, as here, and the area is so vital to the total national supply. The court below thus erred in interpreting *Permian* as excusing all reversible errors. Consequences of repeated errors by the Commission include dissipation of capital funds that must be committed now to exploration if demand is to be met, and the continued inability of the industry to retain or even attract capital that cannot await round after round of "experiments" and possible proclamations of new area rates in another proceeding, four or five years hence. The record before the Court of Appeals, therefore, called for application of *Permian* as a precedent for ordering agency correction of reversible errors. However, this Court's instructions in *Permian* obviously must be repeated, and the misinterpretation of *Permian* in this case by the agency and the court below, including unfounded inhibitions of the court below to reverse plain errors, should be set aside.

4. Questions involving determination of costs, use of atypical and unrepresentative data to determine revenue requirements, application of these determinations in rate design, and absence of required findings arise because of similar misreadings of *Permian*, *Baltimore and Ohio R.R. Co.* v. *Aberdeen & Rockfish*, *supra*, and other decisions of this Court.

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[10] *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968).

As noted below, ". . . a reviewing court must look to both individual components and overall effect of rates set by the Commission," and the agency has "broad discretion" (Appendix A, p. 10). Yet, *Permian* also emphasized the necessity for properly supported findings of fact on critical issues in rate cases under Sections 4 and 5 of the Act. On the questions enumerated herein, it, therefore, is clear that the court's failure to reverse the Commission also resulted in large part from the error of assuming applicability of an immunizing "experiment doctrine."

For example, despite a general statement that the Commission adequately "explained" its cost findings, the court specifically noted important instances where critical cost and rate impact determinations are unsupported by findings. Such Commission failure to make findings on the components of its cost determinations and rates therefore remained grounds for reversal. Of particular significance was the failure of the Commission to consider consequences of its orders, and the court's recognition that the Commission's findings were deficient as to support for use of unexamined cost averages. The court indicates the Commission could eliminate these questions with findings as to whether use of such averages will prevent large segments of the industry from recouping investment and will lead to greater concentration in the industry (Appendix A, pp. 60-64), but the gaps are left unfilled in this case.

A related deficiency is the absence of Commission findings to support a conclusionary statement that capital from "outside sources" will be available for adequate financing, a statement the court notes is "a tenuous basis for our affirmance" (Appendix A, pp. 63-64). The court thus apparently did not appreciate that the missing findings on "averages" and the availability of "outside" capital are both directly related to a deficient gas supply by the Com-

mission's own reasoning. The record thus shows that 53 of 81 producers will be unable to recover their costs at rates fixed, and as to these producers, the Commission held that it will provide no relief by way of an increased price or by permitting abandonment.[11] Instead, the Commission held that such producers have the alternatives of achieving a fair return by *curtailing* their exploration and development program, or of assuming the risk that exploration and development will be profitable at the rates fixed in this case (see Appendix D, pp. 129-130). However, this very curtailment of exploration and development by a majority of producers necessarily will mean a lesser gas supply, and neither the Commission nor the court seemed to note that it is precisely this type of gap in the Commission's methodolgy, fact-finding, and rationale that *Permian* called upon the Commission to correct.

If, as the Court of Appeals assumed, the Commission now were free to correct all of these errors in findings and in determining costs, required return, and weight to be given these costs in rate design, the practical consequences and effect of erroneous precedent could disappear. However, if these determinations in this case stand, each stands as a reversible error predicated on misreading of *Permian* and upon unlawful relaxation of requirements for express, clear, specific agency findings resting on substantial evidence and for a lawful "end result" in a rate case.

5. The Commission first began the area rate proceeding experiment in 1960. This Court endorsed the experimental

[11] The Commission's categorical statement that it would not permit abandonment is to be compared with the court's holding that the lawfulness of using cost averages would be "a different question" if persons regulated were prevented from going out of business when revenues fell below costs (Appendix A, p. 42, fn. 76). The court thus further erred in determining the issue of lawfulness on an erroneous view of the Commission's own holdings.

approach by the Commission in *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 (1963). In *Permian* this Court approved with reservations the Commission's first endeavors in the Permian proceeding, although explicitly recognizing the experimental nature of the area rate concept. However, although this Court in *Permian* admonished the Commission to reconsider its regulatory methods and expressed considerable doubt of the validity of the results reached in the first area rate case, the Commission has since without substantial or appropriate modification followed the narrow utility cost concepts applied in the Commission's Opinion No. 468 which culminated in *Permian* before this Court. The Permian cost concept of regulation has permeated all subsequent area rate proceedings before the Commission and has become the institutional characteristic of Examiners' decisions in the Southern Louisiana, Texas Gulf Coast, Hugoton-Anadarko, and Other Southwest Area Rate proceedings, wherein the Examiners have without question or reconsideration followed religiously the cost of service approach employed by the Commission in Permian Opinion No. 468. As is evident in this case, the Commission itself has continued to follow the narrow and ill-suited regulatory methods which it roughly fashioned in the Permian proceeding.

Thus, the Commission has continued to engage itself in futile exercises in utility rate base cost of service regulatory methods while the gas supply has fallen critically in relation to demand. The conclusion is obvious that the Commission's ill-founded and invalid regulatory concepts have hastened, if not caused, the present critical gas supply shortage. The Commission has continued to indulge the fantasy that producer prices can be determined on the same basis that rates are established for traditional public utilities. In view of the disastrous results of sixteen years

of Commission regulation which have failed to make the essential departure from utility cost of service concepts, this Court should re-examine its sanction of Commission efforts in *Permian* and hold and direct that the Commission employ suitable regulatory methods compatible with the economic characteristics of the gas producing industry and should not continue its futile and dangerous efforts to regulate gas producers on the basis of public utilities. This Court should exercise its clear responsibility to instruct the Commission, through remand and direction, of the appropriate course to take in fashioning and employing regulatory methods for determining producer gas rates. This Court should determine as matters of law and fact that the cost of service methods devised in *Permian* and pursued in the Southern Louisiana Area Rate Opinion Nos. 546 and 546-A should not prevail and cannot afford a valid or proper basis for producer rate regulation.

The opinions below of the Court of Appeals began and ended with expressions of concern over decline in supply and indicia of inability of the industry to meet even the present demand for natural gas. A statement of the reasons why this case warrants review by this Court necessarily must begin and end with similar reference to what is now a "serious supply deficiency" of national concern (see Appendix A, pp. 3, 68).

The Commission did not err in requesting an express remand and removal of any possible doubt as to its powers to take any required responsive action, including rescission of the defective orders.[12] Such Commission action could have been the most expeditious means of removing the legal errors, erroneous precedent, defective rates, and adverse supply consequences created by the opinions and

[12] By petition for rehearing, formal reversal and an express remand order were likewise sought for similar reasons.

orders reviewed below. Questions raised as to the judgment below warrant review to insure that the court below left no bars to corrective Commission action. Otherwise, solely because of technical wording, the substantive remedies, responsive action, and efforts to ameliorate the supply deficiency can be cut off, despite the clear intent of the court below and the Commission's request for remand. Such a disposition of this case would be detrimental to all segments of the natural gas industry and to the consuming public. Therefore, the questions presented by this petition should be considered by the Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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September 14, 1970

SUPREME COURT

OCT 14 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 682, 683, 684, 685, 691, and 692

Southern Louisiana Area Rate Cases

Supreme Court, U.S.
FILED
OCT 14 1970
E. ROBERT SEAVER, CLERK

MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

MOTION OF UNITED DISTRIBUTION COMPANIES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 669, 680, 682, 683, 684, 685, 691, and 692 AND BRIEF AMICUS CURIAE FOR UNITED DISTRIBUTION COMPANIES IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

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Southern Louisiana Area Rate Cases

MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

MOTION OF UNITED DISTRIBUTION COMPANIES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 669, 680, 682, 683, 684, 685, 691, and 692

The following companies are herein referred to as United Distribution Companies:

AMERICAN NATURAL GAS SYSTEM
Michigan Consolidated Gas Company
Wisconsin Gas Company

CENTRAL ILLINOIS LIGHT COMPANY

CENTRAL ILLINOIS PUBLIC COMPANY

CITIZENS GAS AND COKE UTILITY

THE DAYTON POWER & LIGHT COMPANY

EQUITABLE GAS COMPANY

ILLINOIS POWER COMPANY

MICHIGAN GAS UTILITIES COMPANY

(List of Companies continued on next page)

COLUMBIA GAS SYSTEM
- Columbia Gas of Kentucky, Inc.
- Columbia Gas of Maryland, Inc.
- Columbia Gas of New York, Inc.
- Columbia Gas of Ohio, Inc.
- Columbia Gas of Pennsylvania, Inc.
- Columbia Gas of West Virginia, Inc.
- Ohio Valley Gas Company
- Virginia Gas Distribution Company

CONSOLIDATED NATURAL GAS SYSTEM
- Consolidated Gas Supply Corporation
- The East Ohio Gas Company
- The Peoples Natural Gas Company
- The River Gas Company
- West Ohio Gas Company

CONSUMERS POWER COMPANY

NATIONAL FUEL GAS SYSTEM
- Iroquois Gas Corporation
- Pennsylvania Gas Company
- United Natural Gas Company

NIAGARA MOHAWK POWER CORPORATION

NORTHERN ILLINOIS GAS COMPANY

ORANGE & ROCKLAND UTILITIES, INC.

THE PEOPLES GAS SYSTEM
- North Shore Gas Company
- The Peoples Gas Light & Coke Company

SOUTH CAROLINA ELECTRIC & GAS COMPANY

United Distribution Companies (UDC) is an *ad hoc*, voluntary group of 31 distribution utilities listed above serving approximately 10,300,000 customers at retail in the States of Illinois, Indiana, Kentucky, Maryland, Michigan, New York, Ohio, Pennsylvania, South Carolina, Virginia, and West Virginia. The principal cities and metropolitan areas wholly dependent on members of the United Distribution Companies group for their supplies of gas, include Albany, Buffalo, Chicago, Cleveland, Columbus, Dayton, Detroit, Indianapolis, Milwaukee, Pittsburgh, and Syracuse. The population dependent upon the group of distribution companies is estimated to be 48,000,000 people. The United Distribution Companies Group represents approximately 25% of the gas distribution operations throughout the whole United States.

The bulk of the natural gas supplies of UDC is purchased from the major interstate pipeline companies, which in turn secure major portions of their supplies by

purchase from independent producers who operate in the *Southern Louisiana Area* and who are Respondents in the Southern Louisiana area rate cases here sought to be reviewed.

Because of the current and worsening gas shortage and of their inability to secure requisite supplies of additional gas from their pipeline suppliers, the United Distribution Companies are participating, as intervenors, in the new area rate proceeding now being conducted at Federal Power Commission Docket No. AR69-1.

Active participation in the new area rate proceedings at Docket No. AR69-1 during recent months has convinced the United Distribution Companies that the pressing supply problems facing the nation cannot adequately be dealt with and overcome solely through the prescription of higher prospective rates. Such companies are convinced that the problem can be dealt with fully and adequately only through reconsideration by the Commission of all rate and refund issues determined in its initial *Southern Louisiana Area* rate decision.

Through a brief *amicus curiae* submitted in connection with the petitions for rehearing, the UDC Companies urged the court below to remand the case to the Commission for further consideration in the light of the supply situation. While the court below affirmed the Commission, it reserved to the Commission the extraordinary power to reopen and change its order. And the issue now presented to this Honorable Court is whether this disposition by the court below should be reviewed or whether the Commission should first be permitted to reconsider and change its rate fixing order in the light of the supply situation.

United Distribution Companies believe the views they seek to present to this court will contribute to a proper resolution of the troublesome issues before this

Court and for the benefit of the ultimate consumers for whom they seek to assure not only just and reasonable rates but also adequate supplies.

WHEREFORE, United Distribution Companies respectfully request this Court to permit them to file the brief *amicus curiae* which is submitted herewith.

Respectfully submitted.

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IN THE

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MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
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v.

FEDERAL POWER COMMISSION;
Respondent.

BRIEF AMICUS CURIAE FOR UNITED DISTRIBUTION COMPANIES IN OPPOSITION TO CERTIORARI

United Distribution Companies hereby submit their brief in opposition to the Petitions filed in Nos. 669, 680, 682, 683, 684, 685, 691, and 692 for writs of certiorari to review the judgment of the United States Court of Appeals entered in this case on March 19, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, which is included in Continental Appendix A, pp. 1-70, and its

opinion on petitions for rehearing, which is set forth in Continental Appendix B, pp. 1-3, are not yet reported.[1] The opinions of the FPC are reported at 40 FPC 530 and 40 FPC 301. The opinion of the hearing examiner is reported at 40 FPC 703.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1970, and modified and clarified by an order denying petitions for rehearing entered on June 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether this Honorable Court should issue its Writ of Certiorari to review the action of the Court of Appeals in this most extraordinary case, where (1) the Court of Appeals affirmed the rate fixing order of the Commission reluctantly and with "misgivings" in the light of a dangerous supply situation, (2) the Court of Appeals specifically authorized the Commission, as part of the remedy of the case, to reopen its rate order and make such adjustments therein as the "public interest" may require, and (3) the Commission has not yet had an opportunity to act in the public interest pursuant to the mandate of the Court of Appeals.

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[1] In No. 680, Continental Oil Company, *et al.*, Petitioners, filed appendices to their petition containing the complete text of opinions and judgments below as well as the agency's opinions and statues involved.

STATUTE INVOLVED

Sections 4(a), 4(e), 5(a), 16 and 19(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are involved and are reproduced at Continental Appendix F, pp. 1-8.

STATEMENT

The statement of Continental Oil Company *et al* at Docket No. 680 includes a full analysis of the decisions of the Federal Power Commission and of the Court of Appeals and for the sake of brevity we adopt that statement of the case, and make the following additional statements:

When petitions for rehearing were filed, the Court of Appeals questioning *inter alia* whether the Commission could modify the affirmed order since it does not have the power to make rates retroactively, directed the Commission to respond to questions as to whether: (a) the Commission could stay, modify, and rescind an order that had been affirmed; and (b) the Court had equitable powers to affirm while preserving the Commission's power to stay, modify, or rescind.

The Commission took the position that it would not have authority to make any retroactive increases or decreases in a rate order unless authorized to do so by the Court. It stated that the question with respect to "equitable powers" had not been decided. In conclusion, the Commission, by a 3 to 2 vote, requested the Court to remand the case so the Commission could discharge its responsibilities consistent with the Court's opinion.

On the petitions for rehearing, the Court again affirmed the order and stated:

> "We wish to make crystal clear the authority of the Commission in this case to reopen any

part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, be left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.

"At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in the light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all other respects, the original opinion of this Court is the final disposition of the appeal."

Promptly after issuance of the Court's order on June 16, 1970, the Commission entered an order on July 2, 1970, staying its own orders, effective upon dissolution of the Court's stay. Such order is still in effect.

United Distribution Companies have been active in hearings before the Commission in the new *Southern Louisiana Area Rate Case*, AR69-1. Executives of the various United Distribution Companies have testified with respect to the present gas shortage. A United Distribution Companies witness from the financial community also has testified with respect to the enormous capital requirements of the energy industries if the energy requirements of this country are to be met during this decade.

United Distribution Companies propose to participate actively before the Commission in any reopening of the *Southern Louisiana Area Rate Case* here under review.

ARGUMENT

In the presence of the natural gas shortage now facing the Nation, we cannot sufficiently emphasize the importance of this case to natural gas distribution utilities, to the millions of consumers dependent upon them for utility service, and indeed to the public welfare.

The rates fixed for the Southern Louisiana Area must be adequate to provide producers with an incentive to devote immense new quantities of capital to exploration and development and bring the necessary new supplies into the interstate market. A wrong decision upon any part of this whole problem, including the ordering of unduly burdensome refunds, can have disastrous consequences for the interstate consumers.

When the hearings in the *Southern Louisiana Area Rate Case* concluded more than five years ago, hardly anyone foresaw the current gas supply shortage. Although some signs of an impending gas shortage were visible by the time the Commission issued the Opinions and Orders now under review, the full magnitude of the problem was not readily apparent.

By the time that the case reached the Court of Appeals on review, however, the situation had been somewhat clarified. *A Staff Report on National Gas Supply and Demand*, issued in September 1969, was before the Court; and the Court refers to fact that it shows: "perhaps a certainty, that the supply of gas is dangerously low" (Continental Appendix A, p. 52).

The Court of Appeals recognized that this Court held in *Permian* (*Permian Basin Area Rate Cases*, 390 US 747 (1968)) that "adequate findings" would be required in the future, but noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. Thus, the Court of Appeals found "... the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50), and listed defect after defect in "findings" on related questions of supply, demand, and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The court also noted existence of more current data available to the Commission, including the study by the Commission's Staff released in September, 1969, which indicates "perhaps a certainty, that the supply of gas is dangerously low" and "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). In sum, the court found that the assessment of the crucial facts as to supply, demand, and impact of prescribed rates called for by *Permian* had not been made in this case.

The Natural Gas Act, in addition to obligating the Commission to fix "just and reasonable" rates, requires that rates be fixed at levels consistent with the maintenance of an adequate level of service. *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959). The Commission; thus, has a duty to set rates at levels which will obtain the gas needed by interstate consumers. But, it is apparent that the ceiling prices established for the Southern Louisiana Area are inadequate to meet the projected demands. Higher prices will play a vital role in encouraging producers to search for, develop and produce new reserves and in inducing them to dedicate such reserves to the interstate marketplace. Conversely, price "rollbacks" and unduly burdensome refunds will discourage these activities by drawing off capital badly needed for the expansion of exploration and production.

If the rates fixed under Opinion Nos. 546 and 546-A are placed into effect, it is estimated that the producers will be required immediately to refund $375 million at a time when capital is scarce and expensive.[2] To impose such an obligation on the producing industry would drastically reduce the already limited amount of new capital needed to finance new exploratory ventures and would accentuate the present shortages.

The opinions of the Court of Appeals are shot through with expressions of concern over the worsening supply situation and over the probability that the ordered rates and refunds will not provoke its correction. Plainly, the court concluded that further Commission action, through the application of its expertise to the

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[2] The Commission order was based primarily on 1960 data and did not give material recognition to the inflation of the 1960s. The gas requirements of the 1970s cannot be met at the revenue levels of the late 1950s.

developed demand and supply problem, is the best and most effective manner of responding to the situation in the public interest.

Plainly, also the Commission, in the light of the Staff Report and other data now available, shares this deep concern and desires to act, for it requested a remand of the case.

In our opinion, further action by the Commission, well grounded on proper findings as to the supply and demand problem, and as to the bearing of rates and refunds upon its solution, is essential in the public interest; and, until such action is taken, we believe that further review of the case is premature.

WHEREFORE United Distribution Companies respectfully suggest that the public interest will be best served if this Honorable Court denies the Petitions for Writs of Certiorari presented herein.

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October 14, 1970

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the within Motion and Brief *Amicus Curiae* to the Federal Power Commission and to each of the Petitioners for Writs of Certiorari in the above dockets.

C. William Cooper

October 14, 1970

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Nos. 680, ET AL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

CONTINENTAL OIL COMPANY, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

RESPONSE OF E. COCKRELL, JR. TO PETITIONS IN NOS. 680, 681, 682, 683 AND 685

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Respondent.

RESPONSE OF E. COCKRELL, JR. TO PETITIONS IN NOS. 680, 681, 682, 683 AND 685

E. Cockrell, Jr. (Cockrell), a respondent in Nos. 669, 691 and 692, and a petitioner in No. 684; hereby responds to the petitions in Nos. 680, 681, 682, 683 and 685, which such latter petitions also seek writs of certiorari to review the judgment and opinions entered by the United States Court of Appeals for the Fifth Circuit in this same case on March 19, 1970, and June 16, 1970. In response to these petitions, Cockrell would show as follows:

1. In Nos. 669, 691 and 692, Cockrell is filing a brief opposing such petitions.

2. In Nos. 680, 681, 682, 683 and 685, Cockrell does not oppose the granting of such petitions. In the event such

petitions are granted, Cockrell would be aligned with the petitioners and not with the respondent Federal Power Commission.

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October 14, 1970

SUPREME COURT, U. S.

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 681, 682, 683,
684, 685, 691 and 692

MUNICIPAL DISTRIBUTOR GROUP, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT, PIPELINE PURCHASER GROUP

(Southern Natural Gas Company, Tennessee Gas Pipeline Company, Texas Gas Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, United Fuel Gas Company, United Gas Pipe Line Company)

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October 14, 1970

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 681, 682, 683,
684, 685, 691 and 692

MUNICIPAL DISTRIBUTOR GROUP, ET AL., *Petitioners*,

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT PIPELINE PURCHASER GROUP

Respondent Pipeline Purchaser Group[1] opposes the petitions for writ of certiorari in the above-captioned nine causes, all of which relate to the judgment of

[1] The Pipeline Purchaser Group sought judicial review below but is solely a respondent here. The group consists of eight interstate pipeline purchasers, Southern Natural Gas Company, Tennessee Gas Pipeline Company, Texas Gas Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, United Fuel Gas Company, and United Gas Pipe Line Company.

the United States Court of Appeals for the Fifth Circuit entered on March 19, 1970, because under present circumstances the petitions are premature.

OPINIONS BELOW

The opinion of the Court of Appeals dated March 19, 1970, and its opinion on petitions for rehearing dated June 16, 1970, are not yet reported but have been printed as appendices to Continental Oil Company's petition in No. 680, Appendix A, pages 1-70 and Appendix B, pages 1-3, respectively. The opinions and orders of the Federal Power Commission are reported at 40 FPC 530, and 41 FPC 301, respectively.

JURISDICTION

Petitioners have sought to invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

In light of the opinions and judgment below, and the active status of related proceedings being heard by the Federal Power Commission ("Commission") in Docket Nos. AR 69-1, *et al.*, the Pipeline Purchaser Group believes all petitions for writs of certiorari in this case to be premature. Therefore, in our view the question actually presented is:

> Whether it is premature for this Court to review at this time procedural and substantive matters raised by petitioners, since the court below preserved to the Commission the responsibility for determining, in the first instance, the manner in which the recently recognized shortage of natural gas should be treated in prescribing producer rates—an undertaking the Commission is vigorously pursuing in proceedings which have not yet been concluded.

STATEMENT OF THE CASE

Although the petitions adequately describe the general history of the case, they do not focus sharply upon the problem with which the court below, and even more directly the Commission, was confronted.

This proceeding, the second initiated by the Commission under its program to regulate the rates of independent producers of natural gas through area ratemaking, commenced in May, 1961. At that time, and throughout the evidentiary stages of this proceeding, natural gas supplies from the Southern Louisiana area were adequate to meet consumer requirements, although the margin of safety was progressively narrowing.

By the time the Commission issued its decision, Opinion No. 546, on September 25, 1968, the shortage had reached the point at which interstate pipeline purchasers were unable to purchase currently the supplies of gas needed to meet their growing market requirements. Accordingly, when Opinion No. 546 was issued, the Pipeline Purchaser Group filed with the Commission a motion requesting the opportunity to bring to its attention tangible facts as to the gas supply problem, certain in the knowledge that the situation would deteriorate sharply unless the Commission took remedial steps through modification of the recently issued rate order. (R. 398858). Other parties made similar requests.

Although the Commission did not then apprehend the extent to which the gas supply shortage had overtaken the industry, and so did not reopen the proceeding for evidence as to this critical problem, it sought to resolve the issue by initiating another area rate

proceeding for Southern Louisiana, on the same day it denied rehearing in the instant proceeding. The new area rate proceeding, Docket No. AR 69-1, has been moving forward on an accelerated basis throughout the period the instant matter has been under judicial review.

Also, the Commission did not make effective the rate levels provided in its order in the instant proceeding, nor require the payment of refunds based upon such rate levels. In part, this is the result of stay orders issued by the Commission and the court below, and in part it is attributable to the fact that the Commission has not deemed it timely to order such actions.

As the hearings in the new area rate proceeding were commencing, the Commission enlarged the subject matter, initially relating only to offshore regions of the Southern Louisiana area, so as to embrace the onshore regions as well. Thus, the Docket No. AR 69-1 proceeding applies to the entire Southern Louisiana area, and to all vintages of gas, as well as to the appropriate price level for future discoveries.

The Pipeline Purchaser Group, while actively participating in the Docket No. AR 69-1 proceedings, also petitioned for judicial review in the United States Court of Appeals for the Fifth Circuit, urging that the Commission be directed to relate its Southern Louisiana rate order to the eliciting of adequate gas supplies for consumer needs, in light of current conditions.

Without detailing the steps leading to the judgment of the Court of Appeals, it is sufficient for present purposes to note that the Commission ulti-

mately requested a remand, and the court below undertook to assure petitioners and other parties that the Commission would be free to take such action as it deemed necessary to counteract the gas supply shortage. The Commission is currently attempting to do so with active cooperation of almost all the parties, including those involved in this litigation.

As recognized by the court below, the members of the Pipeline Purchaser Group appear in the instant matter solely in their role of purchasers and transporters of Southern Louisiana gas, and their alignment results from the fact that "they are concerned that the price level will not elicit sufficient supply for their needs". (Continental Appendix A, page 2). This is true with respect to this Brief in Opposition as well.

We urge the Court to permit the Commission to proceed as rapidly as possible to resolve the entire pricing problem for the Southern Louisiana area so as to ameliorate what has become a critical gas shortage of nation-wide proportions. This objective can be attained most directly and expeditiously through denial of the petitions for writs of certiorari as prematurely brought.

ARGUMENT

I.

In Its Present Posture, Supreme Court Review of the Judgment Below Would Be Premature

The petitions for writs of certiorari variously seek to question (1) the ratemaking formulae applied by the Commission, some contending that the resultant rates were too low (Nos. 680, 681, 683, 684, 685), and another petitioner contending that they were too high (No. 692); or (2) the procedure employed by the court

below for the purpose of enabling the Commission to implement its rate order if it saw fit while preserving the Commission's authority to modify the order if needed (Nos. 669, 691). Petitioner in No. 692 seeks further review as to both aspects. Finally, the major producer group, Texaco, *et al.*, has conditionally cross-petitioned in No. 681, recognizing prematurity but seeking the right to raise substantive issues in the event certiorari should be granted as to other petitions.

In our view, because of the particular circumstances involved, this case in its present posture presents no issue which is ripe for review. Until the Commission takes further action, which would of necessity be subject to appellate review, no party can be finally affected by the judgment below. And, until the Commission acts, no party can foretell which issues, if any, will ultimately be relevant.

Thus, although it is understandable that parties wish to protect their future positions, or even to obtain judicial sanction for those positions, neither of these objectives calls for affirmative action by the Court at this time.

What is required, we submit, is that the Commission be permitted to take such action as *it* finds to be appropriate in meeting the natural gas shortage in this all-important producing region, and to do so as soon as physically possible. This is so clearly required—and so patently an administrative function—that judicial intervention at this point is neither necessary nor appropriate. It will be time enough to review the court's procedural determination as well as the Commission's substantive ratemaking formulae when an administrative order has been entered dealing comprehensively with all these matters.

As noted above, the Commission instituted a new area rate proceeding in Docket No. AR 69-1 on March 20, 1969, the same day that it denied rehearing in the instant cause. Although initially limited to more recent vintages of gas from the offshore region of Southern Louisiana, the scope of the proceeding was enlarged on December 15, 1969, to embrace *all* vintages of gas from *all* regions of Southern Louisiana.

That proceeding, which none of the petitioners has sought to abort, is presently in a very advanced evidentiary hearing stage and settlement negotiations are progressing concurrently. Since one of the principal objectives of the proceeding is to come to grips with the economic aspects of the current gas shortage, there is every reason to allow that proceeding to be concluded, and no substantial reason to destroy it through piecemeal review of various portions of its subject matter.

The petitions in Nos. 669, 691 and 692 set forth various allegations regarding the impact of the judgment below as to potential refunds, but the facts are that the Commission has never entered an order requiring the payment of refunds in this proceeding. Nor does the court's action in any way preclude ultimate refunds. Contrary to the views expressed in those petitions, the principal issue below related to the rate levels which should have been prescribed—but both the Commission and the Court of Appeals have been at pains to maintain maximum flexibility for the ultimate determination of those rate levels by the Commission.

Since there is no reason to believe that the Commission will shirk its responsibility, and on the con-

trary, there is every indication that it is seeking to arrive at a fair and efficacious solution to a very complex problem, it clearly should not now be hampered or foreclosed.

Finally, with regard to the procedural matters, it is not at all clear that the court's reference to the Commission's freedom to make "retrospective as well as prospective adjustments in this case" would sanction "reparations" or "retroactive ratemaking" as some petitioners suggest. In the first place, as explained above, the Commission's original rate order was never implemented, so this is not an instance of rates having been made effective and later changed, *nunc pro tunc*. Moreover, since the Commission has not taken definitive action in this regard, there is no basis for contending that it has acted unlawfully.

If, in fact, the consequence of the judgment below, or the Commission's action in pending proceedings, were to result in "reparations" or "retroactive ratemaking", the Pipeline Purchaser Group would urge that certiorari be granted and the decision of the court below summarily reversed with directions to remand to the Commission for full reconsideration in light of the critical gas shortage. But, in our opinion, nothing of this nature has occurred.

Thus, both as to the substantive aspects and the procedural questions, the petitions for writs of certiorari present no issue which must, or should be, resolved at this time. The entire subject matter should remain, or be placed, in the hands of the Commission for a definitive determination at the earliest possible time.

CONCLUSION

Wherefore, for the foregoing reasons, the Pipeline Purchaser Group requests that all petitioners for writs of certiorari in these proceedings be denied.

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Nos. 680, 682, 683, 684, and 685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 680, *et al.*

CONTINENTAL OIL COMPANY, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM FOR TEXACO INC., *ET AL.*, IN RESPONSE TO PETITIONS IN NOS. 680, 682, 683, 684, and 685

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 680, *et al.*

CONTINENTAL OIL COMPANY, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MEMORANDUM FOR TEXACO INC., *ET AL.*, IN RESPONSE TO PETITIONS IN NOS. 680, 682, 683, 684, and 685

Texaco Inc., *et al.*, (Texaco, *et al.*), Respondents in Nos. 669, 691, and 692, and Conditional Cross-Petitioners in No. 681, hereby respond to the petitions in Nos. 680, 682, 683, 684, and 685, which also seek writs of certiorari to review the judgment and opinions entered by the United States Court of Appeals for the Fifth Circuit in this same case on March 19, 1970 and June 16, 1970. In response to these petitions, Texaco, *et al.*, state:

1. In Nos. 669, 691, and 692, Texaco, *et al.*, are filing a brief opposing the petitions on grounds of prematurity and on other grounds specifically directed to questions presented in those petitions. In Nos. 680, 682, 683, 684, and 685, Texaco, *et al.*, also oppose the granting of the

petitions on the grounds of prematurity set forth in their Brief in Opposition in Nos. 669, *et al.*, at pp. 7-11.

2. In the event the petitions in Nos. 680, 682, 683, 684, and 685 were granted, Texaco, *et al.*, would be aligned with the petitioners and not with the Respondent Federal Power Commission. While these five petitions raise several issues not raised by Texaco, *et al.*, these petitions also raise the four questions set forth in the Conditional Cross-Petition filed by Texaco, *et al.*, in No. 681. As to these questions, Texaco, *et al.*, therefore would be aligned on the merits with petitioners in Nos. 680, 682, 683, 684, and 685.

3. In the event the petitions in Nos. 669 and all related cases were granted, Texaco, *et al.*, would not oppose the request of Petitioner The California Company in No. 682 that the case then be "summarily remanded to the Court below with instructions to direct the Commission to reopen the case and proceed to such orders as it deems in the public interest."

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OCTOBER TERM, 1970

Nos. 680, 681, 682,
683, 684, 685

CONTINENTAL OIL COMPANY, et al.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

(Continued on inside cover)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT, MUNICIPAL DISTRIBUTOR GROUP

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TEXACO, INC., et al.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

THE CALIFORNIA COMPANY, A DIVISION OF CHEVRON OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

BRADCO PROPERTIES, INC., et al.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

E. COCKRELL, JR.,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

THE SUPERIOR OIL COMPANY,

Cross-Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

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Miscellaneous:

Testimony of Hon. George P. Shultz, Senate Judiciary Sub-Committee on Antitrust and Monopoly, March 3, 1970 . . 18-19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 680, 681, 682,
683, 684, 685

CONTINENTAL OIL COMPANY, et al.,[1]

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT, MUNICIPAL DISTRIBUTOR GROUP[2]

[1] The Federal Power Commission was the only named respondent in the petitions; however, under this Court's rules, the petitioners must name all other parties to the proceeding below as respondents. (Rule 21, par. 4). The Municipal Distributor Group (MDG) was a party to the proceeding before the Commission and the Court of Appeals for the Fifth Circuit and was served with a copy of the petitions. The MDG, therefore, is a respondent, though not named in the petitions. MDG has also filed a petition for writ of certiorari (No. 669) limited solely to the question of whether the Commission may retroactively revise the rates affirmed by the court below.

[2] The Municipal Distributor Group comprises Memphis Light, Gas and Water Division operating municipal gas, electric and water systems in Memphis, Tennessee, and surrounding Shelby County, Tennessee, nine other Tennessee public systems, and American Public Gas Association, having a membership of 201 public systems operating in 28 states.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit and its Opinion on petitions for rehearing are not yet reported. They are printed respectively in Appendices A (pp. 1-70) and B (pp. 1-37) to the petition of Continental Oil Company and Mobil Oil Corporation in No. 680. The opinions and orders of the Federal Power Commission are reported at 40 FPC 530 and 41 FPC 301, and are printed as Appendices D (pp. 1-256) and E (pp. 1-112) to Continental Oil Company's petition.

JURISDICTION

The judgment of the Court of Appeals, printed as Appendix C to the petition of Continental Oil Company and Mobil Oil Corporation was entered on March 19, 1970. The Court of Appeals denied the petitions for rehearing by an opinion issued June 16, 1970 (App. B, pp. 1-3). The mandate was issued July 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming the Federal Power Commission's opinions and orders.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, are set out in Appendix F to the petition of Continental Oil Company and Mobil Oil Corporation.

STATEMENT

PROCEEDINGS BEFORE THE COMMISSION

In May 1961, the Federal Power Commission ("Commission") initiated an investigation to determine and fix the just and reasonable ceiling rates for all sales by independent producers of natural gas in interstate commerce from Southern Louisiana, including the area offshore Louisiana in the Gulf of Mexico[3] (App. D, p. 6; 40 FPC 542). The Commission has described this area, particularly the offshore area, as constituting at the present time and for the foreseeable future a principal area of development of natural gas in the United States (App. D, pp. 6, 10-12; 40 FPC 542, 544-46).

The Commission initiated the investigation under Section 5(a) of the Natural Gas Act (Act)[4] and named as respondents 252 natural gas producers. The Commission also consolidated with the proceedings 199 Section 4(e)[5] proceedings involving 70 of the 252 producers (App. D, p. 6; 40 FPC 542). Numerous distributors of natural gas, private and public, interstate natural gas pipeline companies, state regulatory commissions, other interested parties, and the Commission's Staff participated in the proceedings.

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[3]The Commission has defined this area to include all parts of the State of Louisiana south of the thirty-first parallel, including all areas, both State and Federal, in the Gulf of Mexico off the shore of Louisiana. (App D, p. 6; 40 FPC 542).

[4]Section 5(a) clothes the Commission with the authority to initiate rate investigations on its own motion and, after hearing, to fix just and reasonable rates which are to be prospectively effective, i.e., from and after the date of issuance of the Commission's order fixing the just and reasonable rates (App. F, pp. 3-4).

[5]Section 4(e) proceedings resulted from the unilateral filing of notices of rate changes by producers under Section 4(d) of the Act. When filed they are subject to suspension for a five-month period, and if the rate investigation thereby initiated is not concluded at the end of the suspension period, the increased rates may be made effective subject to refund. (App. F, pp. 2-3).

Prehearing conferences and other meetings were held in an effort to bring the massive proceedings within manageable proportions. After these conferences and meetings had taken place, the cases-in-chief were prepared and served in advance of hearing and were placed in evidence on December 10, 1963. Rebuttal evidence was placed in evidence on March 24, 1964. Cross-examination commenced on April 23, 1964.

The hearings, with recesses, continued until the record was closed on November 5, 1965. The hearings produced a transcript of more than 34,000 pages, about 300 exhibits (most of them voluminous), and many items by reference (for the most part also voluminous).

The Presiding Examiner's decision was issued December 30, 1966 (III J.A. (1) 62d-447d, 40 FPC 703-902). With some exceptions the Examiner adhered to the Commission's *Permian* opinion (*Area Rate Proceeding*, Docket No. AR61-1, Opinion No. 468, 34 FPC 159, affirmed *Permian Basin Area Rate Cases*, 390 U.S. 747. He recommended maximum just and reasonable rates, depending on vintage and whether offshore or onshore production, of 16.75¢ to 19.5¢ per Mcf. After hearing oral argument *en banc*, on May 15 and 16, 1967, the Commission on September 25, 1968 issued its Opinion No. 546 and accompanying order (App. D, pp. 1-258, 40 FPC 530-702).[6] After consideration of applications for rehearing and motions to reopen, the Commission on March 20, 1969 issued its supplemental Opinion No. 546-A and accompanying order (App. E, pp. 1-112; 41 FPC 301). By the supplemental opinion and order, the Commission modified the original opinion and order in

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[6]The decision was issued after this Court on May 1, 1968 had sustained in their entirety the rate orders issued by the Commission in its first effort to fix producer rates on an area, rather than an individual company, basis. The first proceeding involved the Permian Basin. *Area Rate Proceeding*, Docket No. AR61-1, 24 FPC 1121 (1960), affirmed, *Permian Basin Area Rate Cases*, 390 U.S. 747 (May 1, 1968).

part, denied the motions for stay filed by many producers, and in all other respects denied the applications for rehearing.

THE COMMISSION'S OPINIONS NO. 546 AND 546-A AND ACCOMPANYING ORDERS

The Commission established three vintages of natural gas and established the following as the just and reasonable ceiling rate for each vintage (App. D, p. 9; 40 FPC 544):[7]

Vintage	Rate	
	On Shore	Off Shore
	(cents per Mcf)	
All casinghead or oil well[8] gas (gas produced in association with oil) and pre-1961 gas-well gas (including residue gas derived from it) [old or flowing gas-well gas]	18-1/2	17
Gas-well gas sold under contracts dated January 1, 1961 through September 30, 1968 [new gas-well gas]	19-1/2	18
Gas-well gas sold under contracts dated October 1, 1968 or later [new gas-well gas]	20	18-1/2

[7]The Commission fixed January 1, 1961 as the date of division between "new gas-well gas and old gas-well gas". The latter type is also called "flowing gas" by the Commission (App. D, pp. 27-8; 40 FPC 555).

[8]The Commission found that casinghead gas is discovered largely as a product of the search for oil and therefore exploration for it could not be encouraged by awarding such gas the higher second and third vintage rates. The Commission, for this reason, fixed the rates for casinghead gas irrespective of vintage at the first vintage rates (App. D, pp. 85-6; 40 FPC 590-91).

The difference between on-shore and off-shore prices of 1-1/2 cents per Mcf represented the Commission's allowance in on-shore gas prices for Louisiana severance tax (App. D, p. 9; 40 FPC 544).

All of the prices were subject to upward and downward adjustment for heating value (Btu content) and the third vintage rates were also subject to reductions in the event of deviation from specified quality standards.

The rates for second vintage gas-well gas and the even higher rates for third vintage gas were awarded to elicit supply and to encourage continuation of necessary exploration and development.

With respect to rates collected by producers under Section 4(e) of the Act, the Commission rules that refunds would be required by further order of the Commission of the difference between the just and reasonable rate prescribed in Opinion No. 546 and the rate collected subject to refund (App. D, p. 143; 40 FPC 626). With respect to all other rates, the Commission ordered that the collection of rates in excess of the applicable area rate established in Opinion No. 546 from and after September 25, 1968, the effective date of the opinion, shall be subject to refund, plus interest at 7 percent.

The Commission ordered that these ceiling prices would be subject to change only in accordance with the procedure prescribed in Opinion No. 546. Under the procedure there prescribed, any seller seeking to charge rates in excess of the ceiling prices or requesting a change thereof must file a petition for waiver of the Commission-prescribed price and must justify fully the relief sought (App. D, p. 182; 40 FPC 650). Unless and until the Commission grants the petition, the seller may not file rate increases in excess of the applicable area rate prescribed in Opinion No. 546 (App. D, p. 182; 40 FPC 650). These rate-change provisions have been commonly described as prescribing an indefinite moratorium on rate changes.

The Commission's opinion departed from *Permian*, affirmed by this Court in full four months earlier, in a major respect. In *Permian*, the rates prescribed by the Commission were based directly on the costs, including a fair rate of return, determined by the Commission. In the present case, however, the Commission added a series of bonuses or cushions to each category of costs with the result that the rates prescribed were above the cost determinations, including rate of return, of up to 2¢ per Mcf. Consequently, although the prescribed rates were nominally based on a 12 percent overall rate of return on rate base, yielding approximately 13.3 percent return on common stock equity (App. D, pp. 67-8, 104; 40 FPC 579, 601), as the Commission conceded in the court below (Br. for FPC, p. 21, note 12) and the court below found (App. A, p. 40, note), the increments over cost increased the rate of return to more than 14 percent for Louisiana taxed gas (onshore) and to more than 16 percent for untaxed offshore gas.

After consideration of applications for rehearing the Commission on March 20, 1969 issued its Opinion No. 546-A and accompanying order modifying in part and confirming in part Opinion No. 546 and order.

The Commission re-affirmed that the rates established in Opinion No. 546 were just and reasonable. The Commission, however, while re-affirming that 18.5 cents per Mcf was the just and reasonable rate for offshore third vintage gas, exempted such gas from the rate change procedure prescribed by the Commission and authorized producers of such gas to file for contractually authorized increases up to 20 cents per Mcf, subject to suspension and possible refund (App. E, pp. 3-6; 41 FPC 306-07). The Commission also limited the application of the rate change procedures for third vintage on-shore gas sales to a five year period ending January 1, 1974 (App. E, pp. 7-8; 41 FPC 308-09).

Concurrent with the denial of all petitions for rehearing, the Commission initiated a second area rate proceeding at Docket No. AR69-1, limited to certain specified Southern

Louisiana offshore production areas, for the purpose of investigating the allegations of a gas shortage and cause therefor, if one in fact did exist, and to review the rates prescribed for such areas, and, if necessary, to prescribe new rates (App. E, pp. 4-5, 41 FPC 306; 41 FPC 378).[9] Referring to the new rate investigation, at that time limited to offshore production areas in the Federal domain, the Commission said (App. E, pp. 4-5):

> Many of the petitions for rehearing filed by the producers herein, and the motion for further argument filed by the Pipeline Group on November 22, 1968, devote primary attention to the basic question of the adequacy of present gas supplies to meet the increasing demands for natural gas and the adequacy of the rates established in Opinion 546 to elicit the future exploration, development and dedication necessary to meet this demand. No probative showing, based on the record before us, has been made in any such pleadings indicating that the prices we have established will be inadequate to bring forth the optimum degree of effort by the industry. However, the pleadings do lead us to the conclusion that the vital importance of future additional gas supply from the offshore areas in Southern Louisiana warrants the immediate commencement of the further proceeding we had contemplated in our original Opinion herein looking towards a possible revision of the area price ceilings for such gas.

[9]Subsequently, by order issued December 15, 1969, the Commission enlarged Docket No. AR69-1 to include all offshore and onshore Southern Louisiana production areas with the result that the new proceeding became a second round area rate proceeding for Southern Louisiana reaching all rates prescribed in the present case. The new area rate proceeding is now in progress before a Presiding Examiner, any new rates prescribed would be effective from and after the issuance of a final rate order, consistent with the Commission's authority to fix rates prospectively only. *Sections 4(e) and 5(a); Hope Natural Gas v. FPC* (CA 4, 1952), 196 F.2d 803.

Petitions for review were filed in several courts of appeals within minutes of each other after public issuance by the Commission of its Opinion No. 546-A and order. The filing of a petition in the court below being first in time, review jurisdiction vested in that court. Petitions for review filed by producers and pipeline companies challenged the prescribed rates as too low and petitions for review filed by consumer representatives challenged them as too high.

By order of May 13, 1969, the court below granted a stay until hearing on the merits in June 1969, with this stay to expire no later than July 1, 1969. Thereafter, upon numerous producer requests for a later hearing, a conference was convened by the court below to consider these requests. As a consequence, the oral argument was postponed until October 6, 1969 and the Commission, at the court's request, stayed the ordered rate reductions (but no other aspects of its order) until October 13, 1969. The oral argument was held on October 6, 1969, before a panel of the court below which subsequently, by order issued October 17, 1969, vacated the submission of the cause to that panel and reassigned the case for argument and determination before an entirely new panel of judges of the same court. The stay of the Commission's orders was continued. The new panel heard oral argument on December 17, 1969.

Thereafter, on March 19, 1970, the Court below filed its opinion and judgment sustaining in full the Commission's opinions and orders (App. A, p. 69). While expressing less than "full satisfaction" with the Commission's "performance", both with respect to producer and consumer positions, the Court below rejected producer and consumer objections to the orders and found them to be sustained by substantial evidence and free from legal error, recognizing in this connection "that the process of producer regulation is a difficult one that the Commission must have latitude to adapt to changing conditions" (App. A, pp. 2-3, 10, 20-21, 24, 29-30, 40). The court below went on to say that its mandate "should not, however, be interpreted to inter-

fere with Commission action that would change the rates we have approved here." (App. A, p. 69).

Petitions for rehearing were filed by the producer and pipeline petitioners. These petitioners, *inter alia*, agreed that the Commission, notwithstanding affirmance, may modify its orders for the future and the rates to be charged prospectively, but expressed grave doubts that the Commission could revise the rates prescribed in Opinion No. 546, as modified by Opinion No. 546-A, retroactively. Producer and pipeline petitions for rehearing, therefore, urged the court below, as a means of preserving the Commission's authority to revise the rates retroactively, to grant rehearing, and upon such rehearing, to either instruct "the Commission to make further findings on issues deemed deficient by the Court" or to "grant the Motion for Leave to Adduce Additional Evidence heretofore filed" (e.g., Petition for Rehearing of Humble Oil & Refining Company and Humble Gas Transmission Company, pp. 3, 9; Amerada Hess, et al., pp. 2-3, 9-10).

On May 11, 1970, the court below directed the Commission and other parties to the review proceedings to respond to two questions:

> (1) Whether the Federal Power Commission has authority to stay, modify, or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.
>
> (2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify, or rescind the order if the circumstances seem to make these actions advisable.

Responses were filed by MDG, the New York Public Service Commission, Associated Gas Distributors (a group of private distributors of natural gas), and the Commission.

All responses agreed that following affirmance of the Commission's orders, the Commission would not have the power under the Natural Gas Act to revise retroactively the prescribed rates. The Commission also responded that the extent of the Court's equitable powers under Section 19(b) of the Natural Gas Act "apparently has not been decided" and that the extent to which the court's equitable powers "would transcend these statutory powers would be determined by" the court below. Over the vigorous dissent of Commissioner O'Connor, joined by Chairman Nassikas, the Commission by a 3 to 2 vote, concluded its response with an about-face request for remand, unaccompanied by any explanation.

The Municipal Distributor Group, the Associated Gas Distributors and the Public Service Commission of New York opposed the request for remand.

On June 16, 1970, the court below entered an order denying the petitions for rehearing.

The court below stated (App. B, pp. 1-3):

> . . . We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.
>
> At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has

> ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.
>
> In all other respects, the original opinion of this Court is the final disposition of this appeal.[10]

Subsequently, the court below denied producer applications for stay of the mandate, but on July 2, 1970, acting on its own motion, and without notice, the Commission entered an order continuing the stay of Opinions No. 546 and 546-A and accompanying orders.[11]

On July 2, 1970, certain producers, based on the decision of June 16, 1970 of the court below, filed a motion for continuation of the stay and for reopening of the proceedings and consolidation thereof with the new, second round of Southern Louisiana area rate proceedings at Docket No. AR69-1 and for retroactive reconsideration of the rate levels and refund requirements of the orders affirmed by the court below. Pending also before the Commission are petitions by two producers for exemption from the refund requirements of the orders.

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[10] MDG in No. 669, the New York Public Service Commission in No. 692, and the Associated Gas Distributors in No. 691, have filed petitions for writs of certiorari directed to the ruling of the court below that the Commission may revise rates retroactively.

[11] MDG's application for rehearing of the Commission's July 2 order continuing the stay on the ground that the order is beyond the Commission's power, was denied by order issued September 30, 1970.

ARGUMENT

The decision of the court below in the respects challenged by Continental Oil Company and Mobil Oil Corporation (Petitioners),[12] does not conflict with any decision of this Court or with decisions of another circuit court of appeals. The court below properly exercised its functions as a reviewing court and properly affirmed the Commission's opinions and orders on the ground that they are supported by substantial evidence, followed legal standards, and are free from legal error. No issues raised by Petitioners warrant or necessitate review of this Court.

1. In the *Permian Basin Area Rate Cases*, 390 U.S. 747, this Court emphasized that reviewing court's "authority is essentially narrow and circumscribed." (390 U.S. at 766). For the Commission's findings, if supported by substantial evidence, are unqualifiedly conclusive upon the court (390 U.S. at 767); Congress "has entrusted regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts." (390 U.S. at 767); the orders of the Commission are presumptively valid and those who would overturn them have "the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (390 U.S. at 767); and each detail of the Commission's decision need not be examined if the total effect of the order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end (390 U.S. at 767).

In fulfilling its review function, this Court said, a reviewing court has essentially three responsibilities: first, to

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[12]The petitions filed in Nos. 681, 682, 683, 684 and 685 raise substantially the same issues raised by Petitioners in No. 680. Accordingly, while referring only to Petitioners' position in No. 680 in this brief in opposition, it is also intended to be, and is filed, as MDG's brief in opposition to the petitions in Nos. 681, 682, 683, 684 and 685.

determine whether the Commission's orders, viewed in light of the relevant facts and its broad regulatory duties, abused or exceeded its authority; second, to examine the manner in which the Commission employed the methods of regulation it has selected and to decide whether each of the orders' essential elements is supported by substantial evidence; and third, to determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. (390 U.S. at 791-2).

The court below was fully aware of its authority and its responsibilities as a reviewing court as delineated by this Court (App. A, pp. 9, 10) and the court below correctly performed its function. On the question of the specification of the circumstances under which producers could secure relief from the rates prescribed by the Commission, the court below found that the Commission had responded to this Court's suggestion in *Permian* for a more precise specification of changed circumstances that would be ground for relief, and had given examples which "probably constitute as specific an exposition of circumstances for relief as can be expected at this stage in area regulation" (App. A, p. 15). With respect to consumer arguments that the Commission's cost determinations were excessive and that allocation methods adopted by the Commission assigned too much to natural gas and too little to oil, the court below found that the Commission acted on the basis of substantial evidence (App. A, pp. 18-21 and notes 29 to 34, inclusive). With respect to rate of return, the court below reviewed consumer arguments that the 12 percent rate of return was too high and producer arguments that it was too low and rejected the arguments of each on the ground that the Commission's findings on rate of return were supported by substantial evidence and "followed proper legal standards," noting that the "noncost factors" increased the allowed 12 percent rate of return to 14 to 16 percent

(App. A, pp. 23, 24, 40, and note on p. 40). Concerning producer attacks on Commission cost determinations, the court below found that the producers' attacks on the use of cost and on the cost determinations were also made in *Permian* and were there rejected by this Court (App. A, pp. 40-42), and that the Commission's cost findings here were supported by substantial evidence (App. A, 41-42). Respecting the producers' arguments that the record was stale and unrepresentative, despite the fact that there was no issue as to test year before the Commission, the court below rejected the arguments, correctly relying on *ICC v. Jersey City*, 322 U.S. 503, 514-5, and correctly finding that the Commission considered "some data covering years as recent as 1966" and in making choices between older and more recent data on the ground of greater reliability or representativeness "did not fail to consider the most recent data in the record, and it adjusted its findings to allow for rising or falling cost trends" (App. A, p. 44). "Most importantly", the court below found, "it made a finding that costs as a whole during this decade had been remarkably stable (or were even declining slightly) and were likely to remain so, and this finding is based upon substantial evidence." (App. A, p. 44).

In view of the court's findings that the Commission's rulings followed legal standards and were based on substantial evidence, the court below stayed within its proper sphere when it entered its judgment of affirmance. Indeed, contrary to Petitioners' contention (Pet., p. 17) this was the only logical, lawful and required action; not reversal and remand. The court below understood and properly fulfilled its judicial role as a reviewing court.

It is, of course, true that the court below was not entirely satisfied with the extent of some of the Commission's findings and explanations, as they affected consumer and producer arguments, but the court below did not find that the deficiencies amounted to reversible error. Having found that proper legal standards were employed and that substantial

evidence supported the findings on every important aspect of the case that bears on recovery of costs, including an extremely generous 14 to 16 percent rate of return, the court below correctly refused to regard the Commission's opinions and orders when viewed in their entirety as reversible.

Federal Power Commission v. United Gas Pipe Line Company, 393 U.S. 71 (1968) and *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 353 U.S. 944 (1957), cited by Petitioners (Pet. 17), are not in point. In the *United* case, *supra*, the Fifth Circuit undertook to decide how a tax allocation formula should be applied although the Commission had never considered the question. This Court summarily reversed the Fifth Circuit on the ground that it should have remanded the question for consideration by the Commission in the first instance (393 U.S. at 73). Nothing of that nature is involved in this case. In *Sunray Mid-Continent*, the Tenth Circuit reversed the Commission (239 F.2d 97) because it had erred in its interpretation of its authority under Section 7 of the Natural Gas Act. This Court held that the power of the reviewing court was exhausted when it so ruled and that it should have remanded the case to the Commission for consideration on the merits (353 U.S. at 945). This fact situation is not present in this case. Here, the relevant questions presented by the record evidence had been considered and the court ruled that all rulings on such questions were lawful and were supported by substantial evidence.

2. Petitioners' continued insistence that the methods of rate regulation employed by the Commission for producers are inapplicable to producers and that the Commission's cost determinations in this case are faulty (Pet. 15, 23, 24-25) are without merit and provide no basis for a grant of their petition. The same arguments respecting methodology, particularly reliance on cost, were rejected by this Court in *Permian* where they were specifically found to have a "reasoned foundation" and to be within the area of the Com-

mission's expert judgment (390 U.S. at 824), and were rejected by the court below for the same reasons (App. A, pp. 40-42). As for the cost determinations in this case, they were found to be supported by substantial evidence and in accord with legal standards. Petitioners show nothing in their petition requiring a contrary conclusion. Petitioners rely on bold assertion, without record support and citation.

3. The Alpha and Omega of the Petitioners' argument for a writ of certiorari is the claim that there is a present shortage of natural gas which "is directly involved in this case because rates prescribed apply to an area that now provides up to one-third of the total national supply and serves more than one-half the consuming population of the United States." (Pet. 15, 24, 25).[13]

Petitioners state that "the only valid question remaining is, in essence, how to remedy" the supply "situation" (Pet. p. 16), and suggest that reversal is the only remedy (Pet. p. 16). Inherent in the argument is the unwarranted assumption that "the Commission's ill-founded and unsound regulatory concepts have hastened, if not caused, the present critical gas supply shortages." (Pet. p. 24).

Any number of reasons may account for the "shortage", however, which have no relationship to the present order

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[13] Assuming, *arguendo*, that there is a shortage of natural gas, it is important that the Court not be misled. The "shortage" does not affect existing commitments to consumers. There is no "shortage" to meet such existing commitments. The "shortage" refers to new increments of gas to meet an unexpected and explosive recent demand for natural gas, primarily industrial, as a result of air pollution and other environmental considerations. The demand for natural gas has been aggravated by the shortage of other fuels such as low sulphur oil and coal that are suitable for such purposes. The "shortage" assumes all demands should be served by natural gas disregarding the question of the economically wasteful use of natural gas and efficient allocation of the Nation's energy resources, including natural gas, in the Nation's best interests.

in particular and the Commission's regulatory policies in general.[14]

The "shortage" may be the consequence of the acknowledged explosive increase in demand for gas that the industry did not anticipate or prepare for. The "shortage", such as it is, may be the consequence of tax policies that may have reduced internally generated funds available for exploration and development rather than any Commission pricing of natural gas. Depressed sales of oil, upon which the industry principally relies for internally generated funds for exploration and development, may have reduced exploratory effort. Enormous commitments made by the oil companies in foreign areas and Alaska may have drained off funds that would normally have been available for exploration and development of continental, including continental shelf, gas resources. Failure of the Federal government to offer oil and gas leases in areas in the federal domain may have affected reserve additions. The "shortage" may be a result of a combination of some or all of these forces or of others not mentioned. Or the "shortage" may be contrived to force higher prices for natural gas. Testifying before the Senate Judiciary Sub-Committee on Antitrust and Monopoly, Honorable George P. Shultz on March 3, 1970, said:

> The [petroleum] industry is capable of behaving irrationally for short periods, and even of contriving an apparent disaster by ceasing exploration [and] dramatically revising its reserve additions downward . . . [Such industry action could] produce an appearance of crisis calling for immediate 'corrective' action, e.g., . . . higher prices. . . . The industry associations could help to produce such an impression . . . . And we must not forget that the

[14] A lag between exploratory efforts and production of at least several years rules out any relationship between the Commission's orders in this case and the "shortage" which is alleged to have developed on the heels of the Commission's orders.

> 'facts' for decision will be produced largely by these same firms and associations.
>
> The industry is not monopolistic enough to sustain a false reaction over an extended period; in the long run the normal commercial motives will reassert themselves and objective facts would win out. But we have no assured means of preventing overreaction or downright manipulation in the short run, nor is it clear how the administration would distinguish between a fake disaster and a real one. . .

Whatever the cause or causes of the "shortage" may be, it is a circumstance that is not relevant to review of the orders in this case. The court below noted (App. A, p. 52) that "circumstances" had developed subsequent to the close of the record and issuance of the Commission's decisions that "indicate a possibility, indeed perhaps a certainty, that the supply of gas is dangerously low." The "circumstances" included speeches made by members of the Commission (App. A, p. 53), clearly extra-record and non-evidentiary, and an FPC Staff *Report on National Gas Supply and Demand*, (App. A, p. 54) issued six months after the Commission's order on rehearing. With respect to this latter document, which is also extra-record and non-evidentiary, the lower court stated (App. A, p. 58):

> . . . We do not know whether the information that has reached us is correct or not. Staff states that 'For purposes of this report we have accepted at face value all industry furnished data. Our conclusions must therefore be weighed against the assumed accuracy of our data base.' It also states that it is setting forth only one of several possible forecasts, albeit it is the one it thinks most probable.

The whole question of "shortage" was then placed in proper perspective by the court (App. A, p. 58):

> . . . our best course is to keep within the proper sphere of a reviewing court. The point is that the probability of shortage *based on new evidence* is not before us for review; all that is before us is the legal

adequacy, and not the wisdom, of the Commission's orders. (italics supplied)

The true nature and cause or causes of the "shortage" are not known and are yet to be established. The Commission has instituted a new proceeding at Docket No. AR69-1 to do just that and to determine whether rate revisions are in order. Docket No. AR69-1 is the place for the remedy *if* the "shortage" is price-related. *ICC v. Jersey City*, 322 U.S. 503, 515; *National Labor Relations Board v. Condenser Corp.*, 128 F.2d 67, 81 (CA 3).[15] The claim of a gas shortage is simply not relevant to the disposition of the Commission's rate orders.

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[15] ". . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening . . ." (322 U.S. at 515). "The legal situation has to be viewed as of the time of the Board's Decision; otherwise, there is the danger, often spoken of, of making a merry-go-around of the Act." (128 F.2d at 81).

CONCLUSION

The petitions for writs of certiorari in Nos. 680, 681, 682, 683, 684, and 685 should be denied.

Respectfully submitted,

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DENIED
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